Court File No. 41231

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

B E T W E E N:

ENGLISH MONTREAL SCHOOL BOARD,
MUBEENAH MUGHAL and PIETRO MERCURI

APPLICANTS
(Respondents/ Incidental Appellants)

– and –

ATTORNEY GENERAL OF QUÉBEC,
JEAN-FRANÇOIS ROBERGE, in his official capacity,
SIMON JOLIN-BARRETTE, in his official capacity

RESPONDENTS/ APPLICANTS ON CROSS-APPEAL
(Appellants/ Incidental Respondents)

– and –

MOUVEMENT LAÏQUE QUÉBÉCOIS
POUR LES DROITS DES FEMMES DU QUÉBEC

RESPONDENT
(Appellants/ Incidental Respondents)

– and –

FRANÇOIS PARADIS, in his official capacity

RESPONDENT
(Intervener)

(Style of cause continued on next page)

REPLY OF THE APPLICANTS, ENGLISH MONTREAL SCHOOL BOARD, MUBEENAH MUGHAL AND PIETRO MERCURI TO THE ATTORNEY GENERAL OF QUÉBEC AND MOUVEMENT LAÏQUE QUÉBÉCOIS
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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– and –

ICHRAK NOUREL HAK
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CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
FÉDÉRATION AUTONOME DE L'ENSEIGNEMENT
ANDRÉA LAUZON
HAKIMA DADOUCHE
BOUCHERA CHELBI
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INTERVENERS
(Respondents/ Incidental Impleaded Parties)

– and –

CANADIAN HUMAN RIGHTS COMMISSION
THE LORD READING LAW SOCIETY
WORLD SIKH ORGANIZATION OF CANADA
AMRIT KAUR
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PUBLIC SERVICE ALLIANCE OF CANADA (PSAC)
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INTERVENERS
(Impleaded Parties)

– and –

QUEBEC ENGLISH SCHOOL BOARDS ASSOCIATION
FÉDÉRATION DES FEMMES DU QUÉBEC
WOMEN'S LEGAL EDUCATION AND ACTION FUND

INTERVENERS
(Interveners)

AND BETWEEN:

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AMRIT KAUR

APPLICANTS/ INCIDENTAL RESPONDENTS
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MOUVEMENT LAÏQUE QUÉBÉCOIS
POUR LES DROITS DES FEMMES DU QUÉBEC
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INTERVENER

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1. In response to the application for leave to appeal of the English Montreal School Board, Mubeenah Mughal and Pietro Mercuri (“**EMSB et al**”), the respondents raise various insubstantial and irrelevant arguments. These arguments are largely a distraction and in no way undermine the fundamental importance of the questions raised by the proposed appeal, nor the strength of the EMSB et al’s position on those questions.

A. The EMSB et al’s proposed appeal raises fundamental issues of national and public importance tied to s. 23 of the *Charter*

2. The EMSB et al’s s. 23 challenge of Bill 21 has always been based on s. 23 management and control rights. For this reason, the vast majority of the Attorney General of Québec (“**AGQ**”)’s submissions on s. 23 – insisting that the EMSB et al have not shown different and unrelated s. 23 breaches in this case[1] – are irrelevant. It should be obvious that it is no defence to a claim that a *Charter* right has been breached to point to various unrelated ways in which the *Charter* was not breached (e.g., a state ban on religious gatherings breaches s. 2(a) regardless of whether private prayer is prohibited).

3. Further, conspicuously absent from the AGQ’s memorandum of argument is any mention, whatsoever, of this Court’s test for s. 23 management and control. The AGQ states:

> *La Loi 21 ne fait qu’ajouter des conditions générales relativement au port de signes religieux, lesquelles sont applicables à certains représentants de l’État québécois, dont les enseignants, dans le cadre de l’exercice de leurs fonctions. Cette loi n’est pas la seule à imposer des obligations aux enseignants.*[2]

4. It is undisputed that the Province has broad discretion to legislate in the area of education, but its power is constrained by the *Charter*, including s. 23: according to this Court, government measures can regulate official language minority education but only “in so far as they do not interfere with the linguistic and cultural concerns of the minority”.[3]

5. As found by the trial judge, the valuing and celebration of religious diversity is intrinsic to the culture of English schools in Québec and Bill 21 impacts the success of minority religious

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[1] Réponse des intimés (PGQ) aux demandes d’autorisation d’appel [***Réponse du PGQ***] at para 58 and following.
[2] Réponse du PGQ at para 65.
[3] *Mahé v Alberta*, [1990] 1 SCR 342 at 380 [our emphasis underlined]; See also *Arsenault-Cameron v Prince Edward Island*, 2001 SCC 1 at para 53; *Procureur général du Québec c Quebec English School Board Association*, 2020 QCCA 1171 at para 23.

students in English schools.[4] Analogizing the regulation of the expression of religious diversity with the requirement to have a teaching diploma, as the AGQ does,[5] fails to engage with the substantive legal issues in this case. What this Court is asked to clarify is whether official language minority communities benefit from cultural autonomy within their schools, and whether the culture that is protected under s. 23 is entirely subsumed within language.

6. The AGQ argues that "*[j]amais un tribunal n'a conclu que l'article 23 vise la protection d'éléments culturels, sans lien avec la langue, bien que partagés par certains membres ou groupes de membres faisant partie de la minorité linguistique*".[6] Again, the novelty of the present case resides in the fact that the official language majority is attempting to impose avowed cultural legislation on official language minority schools – as such, this Court's guidance is needed to confirm, contrary to the Court of Appeal's conclusion, that such a situation falls squarely within the cultural aspect of this Court's s. 23 management and control test.

7. The AGQ states that "*la jurisprudence de la Cour est unanime sur le fait que la culture est protégée par le biais de la garantie du droit à l'enseignement dans la langue de la minorité*".[7] It should go without saying that instruction in the minority official language helps to protect the official language minority's culture. However, the AGQ erroneously insists (relying on the Court of Appeal) that it is only through the protection of instruction in its language that the official language minority's culture is protected. On this basis, the AGQ insists that Bill 21 cannot infringe s. 23 because, as the Court of Appeal held, Bill 21 "*ne concerne de quelque façon que ce soit la langue d'enseignement, minoritaire ou non, dans les établissements primaires et secondaires*".[8]

8. It is this argument that empties the s. 23 management and control protection of culture of any independent content. It is also this argument that leads to the shocking outcome that, on the AGQ's interpretation, s. 23 would offer no protection from legislation prohibiting schools from teaching about the *Grand dérangement*, contrary to the AGQ's suggestion.[9] While this event had

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[4] *Hak c Procureur général du Québec*, 2021 QCCS 1466 at paras 983, 997, 1001 [***QCCS***].
[5] Réponse du PGQ at paras 66-67.
[6] Réponse du PGQ at para 70.
[7] Réponse du PGQ at para 75.
[8] Réponse du PGQ at para 76, citing *Organisation mondiale sikhe du Canada c Procureur général du Québec*, 2024 QCCA 254 at para 562 [***QCCA***].
[9] Réponse du PGQ at para 78.

devastating impacts on the Acadian community and its language – and the right to teach about this history must plainly be protected by s. 23 – such a right to teach about the community's history (no matter how important) does not fit within the Court of Appeal's narrowly conceived right to "instruction in the language of the official linguistic minority".[10] Of course, this is only one particularly disturbing example of the pan-Canadian results of the Court of Appeal's decision, if left to stand. There are many other examples that show how the purpose of s. 23 management and control would be frustrated if the linguistic majority could prohibit the linguistic minority's expression of its culture in its schools (e.g., most curriculum about the group's history, teaching about the life and works of influential artists from the community, traditional folk dance performances, etc).

9. Through distractions and unfounded assertions, the AGQ attempts to minimize the consequences of the Court of Appeal's decision on s. 23's ability to protect and promote the development of official language minority communities. The reality, however, is that the Court of Appeal's decision has left these communities critically vulnerable and an appeal to this Court is needed to ensure that s. 23 schools can effectively protect and enable the flourishing of official language minority languages and cultures.

B. The EMSB et al's proposed appeal raises fundamental issues of national and public importance tied to s. 28 of the *Charter*

10. The AGQ's first argument on s. 28 is the height of elevating form over substance: the AGQ attempts to discredit the interpretation of s. 28 advanced by the EMSB et al on the basis that they addressed the provision's drafting history before its text.[11] To be clear, the paragraphs of the EMSB et al's memorandum of argument dealing with s. 28's text could have been placed before those dealing with its drafting history without – in any way – changing the interpretive analysis. Indeed, the text and the drafting history are mutually reinforcing. However, particularly at the application for leave to appeal stage, the drafting history illuminates not only the meaning of s. 28, but also the crucial importance of its relationship with s. 33. This very question was directly considered, and a prior version of both s. 28 and s. 33 that had explicitly rendered s. 28 subject to s. 33 was deliberately rejected. While the order of these paragraphs of the EMSB et al's

[10] QCCA at para 530 [our emphasis underlined].
[11] Réponse du PGQ at para 43.

submissions is inconsequential, the significance of the Court of Appeal undoing the framers' deliberate choice is momentous.

11. The AGQ's second argument is equally tenuous. In support of the assertion that the EMSB et al failed to consider s. 28 as a whole and in the context of other *Charter* provisions, the AGQ argues: "*[L]'interprétation de l'article 28 proposée par la CSEM ne peut faire de sens que si l'on fait abstraction de la suite du texte de l'article 28 qui affirme sa raison d'être, soit que « les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes »*".[12]

12. Yet, it is the AGQ that gives no effect to the categorical language of s. 28 and completely ignores that other general provisions of the *Charter*, articulated in much less robust terms (ss. 25 and 29), have been given substantive, and not merely interpretive effect.

13. In any event, that s. 28 guarantees equality in the exercise of other rights and freedoms is a given. The question for this Court is: what occurs when the notwithstanding clause has been invoked with respect to those other rights and freedoms? In this case, the notwithstanding clause has been invoked with respect to freedom of religion (*inter alia*). As such, the question is whether s. 28's guarantee of gender equality in the exercise of freedom of religion has independent substantive content such that s. 28 – which is not subject to the notwithstanding clause and was specifically removed from the scope of the notwithstanding clause – can serve to invalidate provisions of Bill 21 based on the evidence accepted by the trial judge.[13]

14. Contrary to the AGQ's suggestion,[14] the EMSB et al do not argue that the only purpose of s. 28 of the *Charter* is to ensure that gender equality is beyond the reach of s. 33 of the *Charter*. The EMSB et al's submission is that this is a critical function of s. 28 – whether or not this is so is plainly a matter of public importance.

15. As expanded upon in the EMSB et al's application for leave to appeal, answering this question requires an analysis of (a) the effect of invoking s. 33 (denying rights vs permitting

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[12] Réponse du PGQ at para 47.

[13] QCCS at para 807 ("*Le Tribunal souligne que la preuve révèle indubitablement que les effets de la Loi 21 se répercuteront de façon négative sur les femmes musulmanes d'abord et avant tout*"); See also QCCS at paras 802-806, 1102.

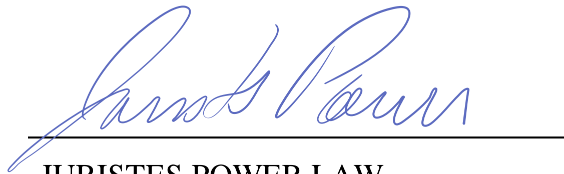
[14] Réponse du PGQ at para 47.

legislation to operate notwithstanding the acknowledged existence of those rights), (b) the device used by s. 28 – a linked right – for guaranteeing equality (analogous to art. 10 of the Québec *Charter of Human Rights and Freedoms*), and (c) the text and history of s. 28 (which, with unusual clarity, demonstrates an intent to not subordinate s. 28 to s. 33).

16. If s. 28 is to be consigned to practical irrelevance as the Court of Appeal would have it, despite being the most significant substantive legacy of feminists' contributions to the *Charter*, these points must first be properly analyzed and grappled with.

17. Finally, the Mouvement laïque québécois's argument that, by wearing religious symbols, teachers breach the duty of neutrality of the state, and therefore that freedom of religion is not engaged in this case,[15] is in complete contradiction with this Court's case law. As this Court has emphasized, "the alleged breach of the duty of neutrality must be established by proving that the state is professing, adopting or favouring one belief to the exclusion of all others",[16] and "state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected".[17]

Dated at Montréal, Québec, this 27th day of May, 2024.



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[15] Réponse de Mouvement laïque québécois at para 29, for example.
[16] *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 83.
[17] *SL v Commission scolaire des Chênes*, 2012 SCC 7 at para 32.

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